Calcutta Licensed Measurers Bengal Chamber of Commerce Vs. Md. Hossain

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Court : Kolkata

Decided On : Nov-29-1968

Reported in : AIR1969Cal378,73CWN491

Judge : A.N. Ray and ;S.K. Mukherjea, JJ.

Acts : Workmen's Compensation Act, 1923 - Sections 2(1) and 3

Appeal No. : F.M.A. No. 126 of 1967

Appellant : Calcutta Licensed Measurers Bengal Chamber of Commerce

Respondent : Md. Hossain

Advocate for Def. : Satya Kanta Saha, Adv.

Advocate for Pet/Ap. : Nalini Kanta Mukherjee, Adv.

Disposition : Appeal dismissed

Judgement :

Ray, J.

1. This appeal is from the judgment and the order of the Additional Commissioner for Workmen's Compensation dated 24 September, 1966 in Claim Case No. 2545

of 1964. The company is the appellant and the workman is the respondent. The workman received personal injury by accident arising out of and in the course of his employment on 27th April, 1964. The workman alleged that he sustained injuries to the left leg and the hip. The workman claimed compensation. The Company admitted that there was an accident and further admitted that there was injury to the hip but denied that there was injury to the leg.

2. The Additional Commissioner for Workmen's Compensation framed two issues. One of the issues was whether the applicant sustained any permanent partial disability on account of the accident in question. The Commr. came to the conclusion that there was an accident and that the accident arose out of and in course of the employment. The further conclusion was that there was injury to the leg as well as the hip and there was permanent partial disablement. The Commissioner came to the conclusion that the applicant lost his earning capacity and assessed the same as 40 per cent loss of earning capacity.

3. Counsel for the appellant contended first that the evidence of the workman was that after the accident he was getting a sum of Rs. 112 per month and therefore, there was no loss of earning and his earning capacity was not reduced. The second contention was that there was no evidence to support the case of loss of earning capacity. Reliance was placed by Counsel for appellant on the Bench decisions in Agent, East Indian Railways v. Maurice Cecil Ryan : AIR1937 Cal526 , Sukhai v. Hukum Chand Jute Mills Ltd,, : AIR1957 Cal601 ; Kali Das Ghosal v. S.K. Mondal, : AIR1957 Cal660 , Commissioners for the Port of Calcutta v. Prayag Ram, : (1967)IILLJ302Cal . These Bench decisions were relied on by Counsel for the appellant to contend that physical incapacity would not be the same as loss of earning capacity.

4. It is necessary to refer to a few provisions of the Workmen's Compensation Act. Section 2(1)(g) defines partial disablement as follows:--

' 'Partial disablement' means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such

disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time'.

5. The other relevant section necessary for the purpose of the present case is Section 4(1)(c)(ii) which refers to compensation in cases of scheduled and non-scheduled injuries.

6. The injury in the present case is a non-scheduled one and there is no dispute as to that.

7. The definition of partial disablement is in two limbs. The statute contemplates partial disablement of a temporary nature and partial disablement of a permanent nature. It is significant to notice the distinction between the two cases of disablement. In the case of disablement of a temporary nature the loss of earning capacity which is spoken of is in any employment in which he was engaged at the time of the accident resulting in the disablement. In other words, the employment in which the workman was engaged at the time of the accident is material. In the case of disablement of a permanent nature the reduction of earning capacity is spoken with regard to every employment in which the workman was capable of undertaking at the time of the accident. In the present case it is a partial disablement of a permanent nature and therefore, the matter for consideration is whether there is reduction of earning capacity in every employment which he was capable of undertaking at that time of the accident resulting in disablement.

8. The contention of Counsel for the appellant is that the workman was earning the same salary if not higher than before the accident. The important words which occur in the Workmen's Compensation Act in the definition section of the Workmen's Compensation Act with regard to partial disablement of a permanent nature are that such disablement has reduced the earning capacity in every employment which he was capable of undertaking. It is the earning capacity in every employment which he was capable of undertaking which has to be found out. To equate earning with earning capacity is to rob the section of vital words. There is undoubtedly difference between earning and earning capacity which has been reduced by disablement. The Bench decisions on which Counsel for the appellant relied do not support the appellant. In the case of Maurice Cecil Ryan,

reported in : AIR1937 Cal526 it was emphasised that earning capacity is capacity to earn money. The loss of earning capacity is also different from the loss of physical capacity, and the latter is not synonymous with reduction of earning capacity. In Ryan's case, : AIR1937 Cal526 it was said that the best estimate that could be given was by the people who had the opportunity to see the workman before and after the accident. Again in Hukum Chand Jute Mill's case reported in : AIR1957 Cal601 it is said that if a workman suffers as a result of an injury from a physical defect which does not in fact, reduce his capacity to work, but at the same time makes his labour unsaleable in any market reasonably accessible to him, there will be either total incapacity for work when no work is available to him at all or there will be a partial incapacity when such defect makes his labour saleable for less than it would otherwise fetch. Counsel for the appellant relied on these observations. These observations were made in a discussion of the question whether incapacity for work and incapacity to work had any relevance in determining compensation under the English Act in a case where a person suffered loss to an eye and again sustained injury to the same eye with the result that the physical defect diminished his eligibility for work though the physical defect did not reduce his capacity to work. Hukum Chand Jute Mills' case, : AIR1957 Cal601 was one of scheduled injury and the case was decided on that basis. The present case is one of non-scheduled injury. The difference between the two cases is that in the case of scheduled injury the reduction of earning capacity is determined by the statute itself and prima facie no further investigation is needed to find out the loss of earning capacity.

9. The other case on which counsel for appellant has relied is Kali Das Ghosal's case, reported in : AIR1957 Cal660 . That case was relied on to contend that loss of earning capacity could not be established by medical evidence. In Kali Das Ghosal's case, : AIR1957 Cal660 , it was observed that the utmost a medical witness can speak by way of a percentage is to give the percentage of the loss of the normal physical capacity or power. As I have already indicated the loss of earning capacity is not the same as the loss of physical capacity.

10. The decision in Ling v. De Dion Bouton, reported in (1920) 1 KB 88 was relied by Counsel for the appellant to contend that the workman did not prove in the

present case that there was any loss of earning capacity. In Ling's case, 1920-1 KB 88 a workman was injured by an accident while employed as a machinist. Prior to such work she had worked as a cook house-keeper. After the accident she resumed her occupation as a cook and did not return to munition work. The County Court which found that she was under no incapacity for work as a cook held that she did not intend to resume munition work and, therefore, the the question of her employment in that capacity did not arise. It was held by the Court of Appeal that the County Court Judge proceeded on a wrong principle by measuring the wage earning capacity of the appellant at the date of the accident not perhaps by her average weekly earning in her then employment but by considering what she would have earned in her previous employment. This case is of no aid to the appellant in the present case because loss of power to earn caused by the accident is to be judged in relation to the employment at the time of the accident or every employment possible at the time of the accident as the case may be.

11. These propositions appear to be established as a result of the decisions. First, earning is not the same as earning capacity; second, the rise in earning may be because of various factors and rise in wages is not decisive of no loss of earning capacity, thirdly, loss of physical capacity is not co-extensive with loss of earning capacity and fourthly, loss of physical capacity or physical incapacity may be relevant in assessing to what extent there is loss of earning capacity for every employment which the workman was capable of undertaking at that time or the employment in which he was engaged at the time of the accident as the case falls for consideration.

12. Judged by these standards the contention of Counsel for appellant that the workman was getting higher income and therefore, there was no loss of earning capacity, is unacceptable.

13. The other question is whether there is evidence. Some of the Bench decisions on which Counsel for appellant relied and to which reference has been made lay down two propositions. First, medical evidence may be necessary to find out loss of physical capacity but medical evidence is after all an opinion evidence with

regard to loss of earning capacity. Secondly, loss of earning capacity would be a pure question of fact. Chakravartti C. J. In Kali Das Ghosal's case, : AIR1957 Cal660 observed that loss of earning capacity or the extent of it is a question of fact. It has to be determined by taking into account the diminution or destruction of physical capacity as disclosed by the medical evidence and then it is to be seen to what extent such diminution or destruction could reasonably be taken to have disabled the affected workman from performing the duties which a workman of his class ordinarily performs. Therefore, medical evidence as to physical capacity or diminution of physical capacity is an important factor in the assessment of loss of earning capacity. In the present case the evidence of the workman himself was that he could not do heavy work even at the date when he gave evidence which was 29 August 1966 and the accident occurred on 27 April 1964. He further said that he did such heavy work before the accident. Therefore, the oral evidence of the workman was that he did heavy work before the accident and that after the accident he could not do heavy work. This evidence was not impeached in cross-examination nor was it challenged by giving any other evidence. On the contrary, in cross-examination the witness said that it was not a fact that he was doing the same heavy work as he did before or that he was not doing light duty. Suggestion is not proof. It was suggested to the workman that he was doing heavy work as he was doing before. That suggestion was not followed by proof on behalf of the company. Similar suggestion that he was not doing light duty was not established by adducing evidence.

14. The evidence adduced on behalf of the company through witness number 4 named workman who was the measuring officer was that the respondent was doing normal duty as a measuring peon, i.e. carrying papers from place to place etc. If a workman after the accident receives higher salary as a measure of concession or as a measure of grace that will not decide that his earning capacity has not been reduced. Again it will appear from the evidence of the respondent that he received injuries and that after the injuries he was using a stick though it was suggested that he was using it as a pretence.

15. Md. Sheikh Taher who was a workman along with the respondent said that the respondent was given light work after he joined his duties and he was not doing

the same duty as he did before. These questions of fact have been gone into by the Additional Commissioner for Workmen's Compensation. It cannot be said that there was no evidence at all. The evidence of the doctor on behalf of the workman was that he assessed the disability as 60 per cent and it was permanent and partial disability. He gave evidence of the several irregularities and disabilities and further said that there was malunion and the gait was limping. The evidence of the doctor on behalf of the company on the other hand, was that from the history furnished by the medical papers the doctor's opinion was that the injury was due to some accident other than that on 27 April 1964. That opinion was not accepted by the Additional Commissioner. There is overwhelming evidence to support the conclusion of the Additional Commissioner that the workman lost his earning capacity.

16. Both the contentions advanced on behalf of the appellant fail. The appeal is dismissed. The appellant will pay to the respondent costs--hearing fee being assessed at 2 G. Ms.

17. All interim orders are vacated.

S.K. Mukherjea, J.

18. I agree.